



BOARD OF INQUIRY (*Human Rights Code*)

Library

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by John McCallum dated January 6, 1994 alleging discrimination in employment on the basis of sexual orientation.

B E T W E E N :

Ontario Human Rights Commission

- and -

John McCallum

Complainant

- and -

Toronto Transit Commission

Respondent

- and -

The Attorney General of Ontario

Intervenor

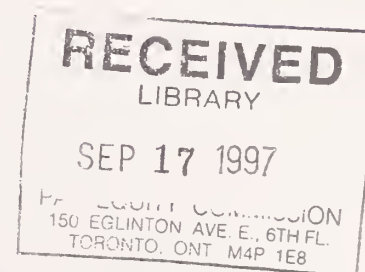
DECISION

Adjudicator : Gerry K. McNeilly

Date : September 16, 1997

Board File No: BI-0040-95

Decision No : 97-019



Board of Inquiry (*Human Rights Code*)

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A P P E A R A N C E S

Ontario Human Rights Commission

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Fiona Sampson
Counsel

John McCallum, Complainant

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John McCallum
On his own behalf

Toronto Transit Commission,
Corporate Respondent

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David Wakely
Counsel

The Attorney General of Ontario,
Intervenor

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Peter Landmann
Counsel

INTRODUCTION

The hearing in this matter was commenced via conference call on May 26, 1995. On January 11, 1996, a motion was brought by the Intervenor, the Attorney General of Ontario (AG), for an order adjourning the proceeding until a decision of the Board was rendered in *Dwyer and Sims v. The Municipality of Metropolitan Toronto and the Attorney General of Ontario* ((1996), 27 C.H.H.R. D/108). On March 29, 1996, I granted the adjournment. A decision in *Dwyer and Sims* was released on September 24, 1996.

Subsequent to the *Dwyer and Sims* decision, the parties settled the merits of the instant complaint, leaving only the assessment of damages to be adjudicated. All parties to this proceeding agreed that section 41 of the *Human Rights Code* R.S.O. 1990, c.H.19 should be applied to assess damages, if any.

The Complainant in this matter alleged discrimination with respect to employment, on the basis of sexual orientation, by the Toronto Transit Commission (TTC). Specifically, the complaint related to the definition of “spouse” in section 107 of the *Municipality of Metropolitan Toronto Act (MMTA)* R.S.O. 1990, c.M.62 and the policy of the TTC to deny spousal benefits to same-sex spouses, allegedly in violation of the *Human Rights Code*.

SUBMISSIONS

Counsel for the Human Rights Commission (the Commission) submitted that there is a presumption in favour of general damages. The guiding principle in human rights law is to have meaningful compensation to make the Complainant whole.

In this regard, the Commission advanced claims for damages under the *Code*, section 41(1)(b) paraphrased:

- (i) restitution for loss arising out of the infringement; and
- (ii) monetary compensation for mental anguish where the infringement has been engaged in wilfully or recklessly.

Commission counsel referred to a number of decisions in support of an award of damages, including: *Cameron v. Nel-Gor Nursing Home et al.* (1984), 5 C.H.R.R. D/2170; *Dudnik v. York Condominium No. 216 (No. 2)*. (1990); 12 C.H.R.R. D/325; *York Condominium Corporation No. 216 et al. v. Dudnik* (1991) 14 C.H.R.R. D/406; *Roberts v. The Queen (Ministry of Health)(No. 2)* (1995), 24 C.H.R.R. D/250; *Grainger v. PIC Para Legal Services et al.* (Unreported, September 15, 1995, Ont. Bd. of Inq.), and *Crook v. Ontario Cancer Treatment & Research Foundation et al.* (Unreported, August 26, 1996, Ont. Bd. of Inq.)

Commission counsel argued that compensation is merited because of the nature of the discrimination the Complainant faced and the ongoing effect the whole matter had on him. She submitted that the Complainant testified that the whole matter caused him frustration and a great amount of stress, so much so that it was necessary for him to seek psychological counselling. While acknowledging that the Respondent, TTC, was not solely responsible for all that occurred, the Complainant takes the position that its hesitance to deal with the matter to extend benefits contributed to and aggravated his stress and medical problems. The Complainant also took the position that it was reckless of the Respondent to not extend benefits to him and his partner, after recent court decisions such as *Egan v. Canada* [1995] 124 D.L.R. (4th) 609 and this Board's decision in *Leshner v. Ontario (No.2)*(1992), 16 C.H.H.R. D/184 (Board of Inquiry). This allegedly reckless conduct left him feeling insulted and showed the TTC to be a corporation lacking in humanitarian concerns.

Commission counsel claimed for general damages an award of \$10,000.00, and, for mental anguish for the reckless behaviour of the Respondent TTC an award of \$2,000.00. In addition, the Commission claimed prejudgment interest pursuant to section 128 of the *Courts of Justice Act*. No claim was made for special damages arising from the TTC's policy.

Counsel for the Respondent TTC submitted that the purpose for awarding damages is to put the person back in the position he was before the alleged infringement. The parties agree that the Complainant suffered no financial loss as at all times he was covered on full benefits plus the Respondent had undertaken to cover his benefits if they ran out.

The Respondent took the position that its governing statute, the *MMTA* prevented it from extending benefits to same-sex spouses. The TTC submitted that it was in fact sympathetic to the Complainant's position but the TTC was advised that it would be a violation of its governing statute if it extended benefits to same-sex spouses. To extend benefits before the decision in *Dwyer and Sims*, the TTC submitted, it would have had to exercise a power and authority not granted to it by its enabling statute.

On requesting an adjournment of this matter, the Respondent undertook to accept the decision of the Board of Inquiry in *Dwyer and Sims* that involved a similar challenge to same-sex definition of "spouse". The Board in *Dwyer and Sims* found the definition of spouse to be discriminatory and ordered that benefits be extended to same-sex spouses. Prior to the resumption of this instant hearing, the Respondent extended same-sex benefits to the Complainant. As there was no financial loss suffered by the Complainant or his same-sex spouse, the Respondent argued that there should be no award made in favour of the Complainant.

In support of its submissions, the Respondents presented the following cases: *Leshner v. Ontario* (No.2)(1992), 16C.H.R.R. D/184 (Bd. Of Inquiry), *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek))*, [1996] O.H.R.B.I.D. No. 37 (QL) (Ont. Bd. of Inquiry), and *Blainey v. Ontario Hockey Assn.* (No.2)(1988), 9 C.H.R.R. D/4972) (Ont. Bd. of Inquiry).

DECISION

I have considered the submissions of the parties. The hearing in this matter did not continue on the merits because of the Respondent's undertaking to follow the decision in *Dwyer and Sims*. In my view, the TTC did not intentionally apply a policy or take a position which it knew would infringe the Complainant's rights under the *Code*. It acted within the strict mandate of its statute but was also aware of the developing body of case law that found definitions similar to section 107 *MMTA* to be inconsistent with today's equality values. I am persuaded by the following factors: early on in the proceedings, the Respondents gave an undertaking to cover any costs or expenses incurred by the Complainant that was not otherwise covered by his policy; and, the Respondent's human resources personnel worked closely with the Complainant to provide him with resources and a vehicle to

express and disseminate his views throughout the organization. I find that the evidence does not show a pattern of wilful or reckless disregard for the Complainant's rights such as might support an award for mental anguish.

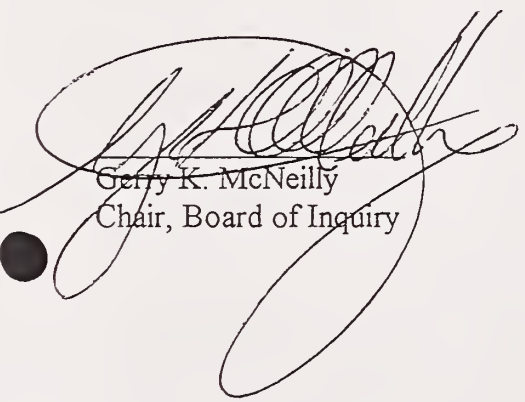
The fact that the TTC felt it may have been technically without authority to grant benefits to persons in same-sex relationship does not absolve it of responsibility. The Municipality of Metropolitan Toronto, the TTC's governing body, had extended benefits to same-sex spouses since 1992, even though it did so on an "interim" basis because it too had a statutory definition of "spouse" similar to that in the *MMTA*. The TTC could have copied Metro and concluded this matter sooner. There is no question in my mind that the Complainant suffered stress and anxiety given that he had to sustain this complaint over a period of 3 years. The TTC's lack of intention is not reason enough to refuse to make an award to compensate the Complainant for losses arising out of the infringement. I therefore find that this is an appropriate matter in which to make a compensatory award. In doing so, I am relying on the decision of *Dwyer and Sims*, which decision the TTC accepted to settle the instant matter. The Complainant, I accept, experienced infringement of his right to be free from discrimination and I order an award of \$2,500.00 to compensate the Complainant for this infringement.

ORDER

The Respondent TTC is ordered to pay to the Complainant as general damages:

- (a) the sum of \$2,500.00 as compensation for the loss of his right to freedom from discrimination;
- (b) prejudgment interest from the date of the complaint was filed January 6, 1994 to January 11, 1996, the date of the motion to adjourn, calculated at the rate of 4.3% per annum on the amount of \$2,500.00.

Dated in Toronto this 16th day of September, 1997.



Gerry K. McNeilly
Chair, Board of Inquiry

